

1
2
3
4
5
6
7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
9

10 UNITED STATES OF AMERICA ex rel.
11 NORMA ARIAS BENITEZ, *et al.*,

12 Relator,

13 v.

14 GALLIANO, LLC, *et al.*,

15 Defendants.

Case No. 2:15-cv-01688-LDG (NJK)

ORDER

16
17 The plaintiff, Norma Arias Benitez, brought this qui tam action on behalf of the
18 United States under the False Claims Act. In her Amended Complaint (ECF No. 39),
19 Benitez alleges she rented housing from the defendants—Galliano, LLC (the owner of the
20 premises) and Golden River Investments, LLC (who acted as Galliano's agent). As the
21 tenancy was governed by Section 8, Galliano entered into a contract with the Southern
22 Nevada Regional Housing Authority (SNRHA) establishing that the rent would be \$994.
23 Galliano further agreed that it would not attempt to collect additional rent. Benitez alleges,
24 however, that the defendants improperly and illegally charged her rent in excess of this
25 amount.
26

1 The parties have filed cross-motions for summary judgment on Benitez's FCA claim.
2 (ECF Nos. 42, 62, 63). The defendants have argued that Benitez can neither establish
3 they acted with scienter in seeking to collect \$1,191 from her each month, nor that their
4 statement that they would collect additional rent, nor their conduct of seeking additional
5 rent, was material. The Court disagrees, and grants partial summary judgment in favor of
6 Benitez.

7 Galliano has also moved to strike Benitez' reply to its opposition to her motion (ECF
8 No. 58), which the Court denies.

9 Benitez also seeks a declaration that she does not owe late-payment fees to the
10 defendants, and that defendants failed to return her security deposit. Golden River filed a
11 counterclaim seeking payment of the late fees (ECF No. 40), and further seeks summary
12 judgment as to Benitez' related claims (ECF No. 62). Benitez moves to dismiss the
13 counterclaims (ECF No. 43).¹ The Court will deny the defendants request for summary
14 judgment on Benitez' related claims. The Court will deny Benitez' motion to dismiss
15 Golden Rivers counterclaim for breach of contract, but will grant the motion as to Golden
16 River's other counterclaims.

17 Motion for Summary Judgment

18 In considering a motion for summary judgment, the court performs "the threshold
19 inquiry of determining whether there is the need for a trial—whether, in other words, there
20 are any genuine factual issues that properly can be resolved only by a finder of fact
21 because they may reasonably be resolved in favor of either party." *Anderson v. Liberty*
22

23 ¹ The defendants also filed motions to dismiss the original complaint. In a
24 stipulation permitting Benitez to file an Amended Complaint, (ECF No. 37), the parties
25 further stipulated that the Court could consider those motions as if filed in response to the
26 Amended Complaint. In moving to dismiss, the defendants submitted and referenced
documents integral to the pleadings. The cross-motions for summary judgment rely upon
many of the same documents and some of the same arguments are presented in the
defendants' motions to dismiss. Accordingly, in the interest of judicial economy, the Court
will deny the defendants' motions to dismiss as moot.

1 *Lobby, Inc.*, 477 U.S. 242, 250 (1986); *United States v. Arango*, 670 F.3d 988, 992 (9th Cir.
2 2012). To succeed on a motion for summary judgment, the moving party must show (1)
3 the lack of a genuine issue of any material fact, and (2) that the court may grant judgment
4 as a matter of law. Fed. R. Civ. Pro. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322
5 (1986); *Arango*, 670 F.3d at 992.

6 A material fact is one required to prove a basic element of a claim. *Anderson*, 477
7 U.S. at 248. The failure to show a fact essential to one element, however, "necessarily
8 renders all other facts immaterial." *Celotex*, 477 U.S. at 323. Additionally, "[t]he mere
9 existence of a scintilla of evidence in support of the plaintiff's position will be insufficient."
10 *United States v. \$133,420.00 in U.S. Currency*, 672 F.3d 629, 638 (9th Cir. 2012) (quoting
11 *Anderson*, 477 U.S. at 252).

12 "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after
13 adequate time for discovery and upon motion, against a party who fails to make a showing
14 sufficient to establish the existence of an element essential to that party's case, and on
15 which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. "Of
16 course, a party seeking summary judgment always bears the initial responsibility of
17 informing the district court of the basis for its motion, and identifying those portions of 'the
18 pleadings, depositions, answers to interrogatories, and admissions on file, together with the
19 affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material
20 fact." *Id.*, at 323. As such, when the non-moving party bears the initial burden of proving,
21 at trial, the claim or defense that the motion for summary judgment places in issue, the
22 moving party can meet its initial burden on summary judgment "by 'showing'—that is,
23 pointing out to the district court—that there is an absence of evidence to support the
24 nonmoving party's case." *Id.*, at 325. Conversely, when the burden of proof at trial rests
25 on the party moving for summary judgment, then in moving for summary judgment the
26 party must establish each element of its case.

Once the moving party meets its initial burden on summary judgment, the non-moving party must submit facts showing a genuine issue of material fact. Fed. R. Civ. Pro. 56(e); *Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1103 (9th Cir. 2000). As summary judgment allows a court "to isolate and dispose of factually unsupported claims or defenses," *Celotex*, 477 U.S. at 323-24, the court construes the evidence before it "in the light most favorable to the opposing party." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). The allegations or denials of a pleading, however, will not defeat a well-founded motion. Fed. R. Civ. Pro. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). That is, the opposing party cannot "rest upon the mere allegations or denials of [its] pleading' but must instead produce evidence that 'sets forth specific facts showing that there is a genuine issue for trial.'" *Estate of Tucker v. Interscope Records*, 515 F.3d 1019, 1030 (9th Cir. 2008) (quoting Fed. R. Civ. Pro. 56(e)).

Background

Both defendants argue, in their respective oppositions to Benitez' motion for summary judgment, that her motion should be denied because much of it rests upon documents that Benitez has not authenticated. A review of Benitez' motion indicates, however, that it generally rests on allegations that neither defendant has disputed. While the defendants take issue with the submission of a copy of Golden River's ledger, they do not dispute that the proffered copy is an accurate copy of the ledger. Benitez has, in her reply, authenticated the document and indicates she received the ledger from Golden River. Further, the defendants have not disputed that a pivotal fact established by the ledger: that after deducting the Section 8 assistance payment charged to the SNRHA, they charged Benitez an amount that exceeded, by \$197, her portion of the rent. Benitez' motion also rests upon documents that the defendants acknowledged and attached to their motions to dismiss, and documents that Golden River attached to its motion for summary

1 judgment, which motion Galliano joined. Accordingly, the Court will not deny Benitez'
2 motion on this basis.

3 Benitez leased housing owned by Galliano and managed by Golden River. Benitez
4 is a recipient of a Section 8 Public Housing Voucher through the Southern Nevada
5 Regional Housing Authority (SNRHA).

6 Under the Section 8 program, the U.S. Department of Housing and Urban
7 Development enters into annual contribution contracts with public housing agencies, such
8 as the SNRHA, to administer federal subsidy payments for low-income housing. When a
9 tenant locates a suitable unit for rent and obtains the owner's consent to participate in the
10 Section 8 program, the tenant and owner submit a Request for Tenancy Approval (RTA) to
11 the SNRHA. In the RTA, the tenant and owner identify which party will be responsible for
12 providing or paying for utilities, such as sewer and trash, or the provision of appliances.
13 Along with the RTA, the tenant and owner must also submit a completed and signed, but
14 undated, lease agreement to the SNRHA.

15 When the SNRHA receives an RTA and proposed lease, the SNRHA's inspection
16 department tests the proposed rent to be charged by the owner, which will be subsidized
17 by payments from the SNRHA, for affordability and reasonableness. Rent is considered
18 reasonable if it falls within the range of rent charged for similar housing within the
19 community. Rent is considered affordable if it does not exceed 40 percent of a tenant's
20 reported income. Rent will be subsidized under the Section 8 program only if it is both
21 affordable and reasonable.

22 If the proposed rent exceeds the amount of rent determined to be either affordable
23 or reasonable, the SNRHA contacts the owner to determine whether the owner is willing to
24 proceed at a reduced amount of rent that does not exceed the permissible affordable and
25 reasonable rent. If the owner does not agree to reduce the rent, the SNRHA will not
26 subsidize the rent for the tenancy.

1 If the owner agrees to proceed and accept the reduced amount of rent that the
2 SNRHA determined to be both affordable and reasonable, the owner and the SNRHA enter
3 into a Housing Assistance Payments (HAP) contract. Pursuant to this contract, SNRHA
4 makes monthly housing assistance payments on behalf of the eligible tenants. The HAP
5 contract also establishes the maximum rent that the owner may charge the tenant. More
6 particularly, the HAP contract prohibits the owner from charging the tenant rent in excess of
7 the amount of the approved rent.

8 In addition to the HAP contract, the property owner and tenant enter into a lease
9 agreement that is consistent with the HAP contract and that complies with federal
10 regulations. The owner and the tenant must also identify, consistent with the terms of the
11 HAP contract and the lease, responsibility for providing and paying for utilities, including
12 sewer and trash, and appliances.

13

14

15

16

17

18

19

20

21

22

23

24

25

26

1 On December 14, 2012, Galliano and Benitez signed a lease agreement,² on a
 2 Residential Lease Agreement form, for the premises that Benitez intended to lease under
 3 the Section 8 program.³ The heading for Section 2 of the form is "SUMMARY," and the
 4 form indicates the section concerns "[t]he initial rents, charges and deposits"
 5 Pursuant to line 5 of this section, the rent for the period from 1/17/13 to 1/31/13 was \$481.
 6 Line 6 recites that the Security Deposit for the unit was \$994, an amount equal to one
 7 month of rent. On line 15, the parties recited: "SEWER/TRASH \$35."

8 Section 3 of the lease, under the heading "ADDITIONAL MONIES DUE," recites that
 9 "RENTAL PAYMENT WILL BE \$1,191 INCLUDING SEWER AND TRASH"

10 The heading for Section 5 is "TERM." The section recites that the term of the lease
 11 would commence on January 17, 2013, and continue until January 31, 2014, for a total rent
 12

13 ² In opposing Benitez' motion, Galliano argues there is no evidence that it
 14 signed or reviewed or was aware of any of the documents at issue in this case. Galliano
 15 attached the declaration of Pauline Yeung to its opposition. Yeung who states that she is
 16 the sole trustee and beneficiary of Global Investments Trust, which is the sole officer of
 17 Galliano. She admits that Galliano is the owner of the property it leased to Benitez.
 18 Galliano has also admitted that Golden River acted as its property manager for the housing
 19 unit at issue.

20 When an agent acts in the name of the entity, to secure
 21 government funding, the fraudulent intent of the agent is
 22 indistinguishable from the intent of the entity. So long as the
 23 agent has actual or apparent authority to bind the entity, the
 24 fraud of the agent is sufficient to support civil liability against the
 25 entity.

26 *United States ex rel. Rosales v. San Francisco Housing Authority*, 173 F.Supp.2d 987,
 1003 (N.D. Cal. 2001)

27 Accepting, for purposes of this motion, Galliano's assertion that it was unaware of
 28 Golden River's action taken on its behalf, such lack of awareness or knowledge does not
 29 establish that Golden River was not acting on behalf of Galliano. Neither Galliano nor
 30 Golden River have proffered any argument or evidence that Golden River did not sign the
 31 documents at issue in this matter, whether in its own name or in the name of Galliano.

32 For ease of reference, and because Golden River acted on behalf of Galliano, the
 33 Court's references to actions taken by Galliano refer to all actions taken either by Galliano
 34 or by Golden River on behalf of Galliano.

35 ³ This lease was to be submitted signed but undated to the SNRHA. The form
 36 was dated of December 14, 2012. The document submitted to the Court is signed, but the
 37 parties have not indicated the date on which the lease was signed.

1 of \$12,609.00, then on a month-to-month basis. The heading for Section 6 is "RENT." The
2 section recites that the monthly rent for the premises is \$994.

3 The heading for Section 16 is "UTILITIES." The language of the form recites that
4 the tenant shall immediately connect all utilities and is to pay all utilities and other charges
5 in connection with the premises. The section, however, then provides blank spaces
6 allocating responsibility for electricity, trash, phone, gas, sewer, cable, water, septic, and
7 association fees as between the owner and tenant. Each of the blanks are completed with
8 a typewritten "T" indicating that Galliano and Benitez allocated responsibility to her for each
9 of the utilities items except septic (no allocation) and association fees (allocated to the
10 owner). In subsection 16.a, that parties indicated that the "TENANT is responsible to
11 connect the following utilities in TENANT'S name: POWER, GAS, WATER, PHONE,
12 CABLE & RENTER'S INSURANCE." In subsection 16.b, the parties recite that
13 "LANDLORD will maintain the connection of the following utilities in LANDLORD'S name
14 and bill TENANT for connection fees and use accordingly: SEWER & TRASH."

15 The heading for Section 34 is "CONFLICTS BETWEEN LEASE AND ADDENDUM."
16 The entirety of text of the section is form language, and provides, "In case of conflict
17 between the provisions of an addendum and other provisions of this Agreement, the
18 provisions of the addendum shall govern."

19 Benitez also signed, on December 14, 2012, a document on Golden River
20 stationary, titled "Addendum #2." The document states: "The rent is \$1191 per month,
21 which includes sewer and trash. Tenant, Norma Ariasbenitez has Section 8. Tenant is
22 responsible to pay the remaining portion of what Section 8 does not cover." In her
23 declaration, Tam acknowledges having Benitez sign this document to acknowledge the
24 agreement.

25 On that same date, Galliano and Benitez signed an RTA that Golden River
26 subsequently submitted to the SNRHA. On the RTA, the parties recited that the proposed

1 rent was \$1099. The parties also completed the RTA form to indicate that heating,
2 cooking, water heating, air conditioning, refrigerator, water, sewer, and trash collection
3 would be provided by the owner and paid for by the tenant.

4 While the SNRHA determined that a rent of \$1099 would be a reasonable rent within
5 the community, it further determined that this amount of rent was not affordable as it
6 exceeded 40% of Benitez's stated income.

7 On January 3, Galliano signed a "Reduction of Rent Acknowledgment." In doing so,
8 Galliano agreed to reduce the rent from \$1,099 to \$994 so that Benitez could qualify for
9 payment assistance for the housing based upon the 40% rule. Galliano further agreed that
10 no additional rent would be collected from Benitez and that if it was discovered that
11 additional rent was being collected, the HAP contract would be terminated and the owner
12 would no longer be allowed to rent housing to Housing Choice Voucher participants.
13 Galliano further agreed to lower the security deposit so that it would not exceed one
14 month's rent and acknowledged its understanding that the owner could not "collect the
15 difference in the rent change from [Benitez] resident/client; by doing so is a breach of the
16 Housing Choice Voucher Contract . . ."

17 On January 17, 2013, Galliano signed the HAP contract. Part A of the HAP contract
18 includes the following terms. Paragraph 5 recites that the initial term of the lease is
19 January 17, 2013, through January 31, 2014. Paragraph 6 recites that the initial rent to
20 owner is \$994 and that "the owner may not raise the rent to owner." Paragraph 8 recites
21 that the tenant "shall provide or pay for" heating natural gas, cooling air conditioning,
22 cooking natural gas, other electric, water heating gas, water, sewer Las Vegas and
23 Henderson, and trash collection. The same paragraph provides that the "owner shall
24 provide or pay for" the refrigerator and range. This paragraph further indicates that
25 "[u]nless otherwise specified below, the owner shall pay for all utilities and appliances

26

1 provided by the owner." The contract lacks any indication that the tenant would be
2 responsible for paying for the refrigerator or range.

3 Part B of the HAP contract is identified as the "Body of Contract." Paragraph 2.d of
4 this Part provides: "The owner certifies that: (1) The owner and the tenant have entered
5 into a lease of the contract unit that includes all provisions of the tenancy addendum."
6 Paragraph 5 provides: "(a) The lease must specify what utilities are to be provided or paid
7 by the owner or the tenant. (b) The lease must specify what appliances are to be provided
8 or paid by the owner or the tenant. (c) Part A of the HAP contract specifies what utilities
9 and appliances are to be provided or paid by the owner or tenant. The lease shall be
10 consistent with the HAP contract." Paragraph 7(b) of Part B provides: "Unless the owner
11 has complied with all provisions of the HAP contract, the owner does not have a right to
12 receive housing assistance payments under the HAP contract."

13 Paragraph 8 of Part B identifies additional owner certifications. Paragraph 8(b)
14 provides, "The contract unit is leased to the tenant. The lease includes the tenancy
15 addendum (Part C of the HAP contract), and is in accordance with the HAP contract and
16 program requirements. The owner has provided the lease to the PHA [the SNRHA],
17 including any revisions of the lease." Paragraph 8(d) provides, "Except for the rent to
18 owner, the owner has not received and will not receive any payments or other
19 consideration (from the family, the PHA, HUD, or any other public or private source) for
20 rental of the contract unit during the HAP contract term."

21 Part C of the HAP contract is the "Tenancy Addendum," and constitutes an
22 addendum to the lease as provided in Paragraph 8 of Part B of the HAP contract. As
23 recited in Paragraph 12.b of Part B, "[t]he tenant or the PHA may enforce the tenancy
24 addendum (Part C of the HAP contract) against the owner, and may exercise any right or
25 remedy against the owner under the tenancy addendum."

26

1 Paragraph 2.a of the Tenancy Addendum recites that, “[t]he owner has given the
2 PHA a copy of the lease, including any revisions agreed by the owner and the tenant. The
3 owner certifies that the terms of the lease are in accordance with all provisions of the HAP
4 contract and that the lease includes the tenancy addendum.” Paragraph 2.b provides:

5 The tenant shall have the right to enforce the tenancy addendum against the
6 owner. If there is any conflict between the tenancy addendum and any other
provision of the lease, the language of the tenancy addendum shall control.

7 Paragraph 4.a of the Tenancy Addendum recites that “[t]he initial rent to owner may
8 not exceed the amount approved by the PHA in accordance with HUD requirements.”

9 Paragraph 4.b provides that “the owner may not raise the rent during the initial term of the
10 lease.”

11 Paragraph 5.e of the Tenancy Addendum provides that “[t]he owner may not charge
12 or accept, from the family or from any other source, any payment for rent of the unit in
13 addition to the rent to owner. Rent to owner includes all housing services, maintenance,
14 utilities and appliances to be provided and paid by the owner in accordance with the lease.”

15 Paragraph 5.f of the Tenancy Addendum provides that “[t]he owner must immediately
16 return any excess rent payment to the tenant.”

17 Paragraph 14(b) of the Tenancy Addendum provides:

18 In case of any conflict between the provisions of the tenancy addendum as
required by HUD, and any other provisions of the lease or any other
19 agreement between the owner and the tenant, the requirements of the HUD-
required tenancy addendum shall control.
20

21 Analysis

22 The essential elements of liability under the False Claims Act are as follows: (1) a
23 false statement or fraudulent course of conduct, (2) made with scienter, (3) that was
24 material, (4) causing the government to pay out money or forfeit money due. *United States*
25 *v. Univ. of Phoenix*, 461 F.3d 1166, 1174 (9th Cir. 2006).

26

1 As to whether Galliano made a false statement or engaged in a fraudulent course of
2 conduct, the defendants concede that Benitez “may be able to show [Golden River]
3 erroneously interpreted the HAP Contract and related documents it actually reviewed.” As
4 Galliano’s agent, Golden River’s interpretation is attributable to Galliano. The concession
5 is appropriate. Pursuant to the HAP contract and the lease, the rent to owner that the
6 defendants were entitled to receive was \$994, which amount included fees for sewer and
7 trash. Galliano represented and agreed, in the HAP contract and the Tenancy Addendum
8 to the lease, that it would not collect rent from Benitez or any other source that was in
9 addition to this amount. However, from the outset of the tenancy, Galliano charged and
10 collected or attempted to collect \$197 from Benitez in excess of her portion of the rent to
11 owner. This conduct rendered Galliano’s representations that it would not collect additional
12 rent from Benitez false; conversely, Galliano’s representation that it would not charge or
13 collect additional rent establishes that its subsequent conduct of charging Benitez
14 additional rent each month was fraudulent.

15 The defendants also do not dispute that Galliano’s statement—that it would not
16 collect additional rent—caused the government to pay out money. The SNRHA receives
17 money from United States each year pursuant to Section 8, a portion of which it used to
18 subsidize Benitez’ rent payments throughout her tenancy. Had Galliano not entered into
19 the HAP contract, in which it represented and agreed that it would not collect additional rent
20 from Benitez, the SNRHA would not have made any assistance payments to Galliano.

21 The parties do dispute, however, whether Galliano’s statements and conduct were
22 made with scienter and whether the statements and conduct were material to the
23 government paying out the money.

24 The Court will begin by considering whether the statements and conduct were
25 material. The defendants argue that Benitez cannot show that Galliano’s statements that it
26 would not collect additional rent, and the subsequent conduct of charging additional rent,

1 were material because the SNRHA didn't actually take action against them despite having
2 "actual notice" that Galliano sought authority to collect \$1,191 from Benitez. They also
3 assert that, assuming the SNRHA lacked notice, the SNRHA would not have cancelled the
4 contract but would have required a corrective lease. The evidence, when construed in
5 favor of the defendants, establishes that the breach was material as a matter of law.

6 The defendants' first argument rests on the premise that the SNRHA had actual
7 notice that Galliano sought authority to collect \$1,191 from Benitez. The argument fails
8 because the amount of money for which Galliano originally sought authority to collect is
9 irrelevant. The SNRHA did not enter into a HAP contract with Galliano based upon the
10 amount of rent that Galliano originally sought for the housing unit from Benitez. Rather, the
11 statements of Galliano that are relevant to materiality is that Galliano agreed that it would
12 reduce the rent to \$994, and agreed that it would not attempt to collect the difference
13 between the amount originally sought and the reduced amount, and agreed that it would
14 not seek rent in addition to \$994.

15 The defendants next argue that Galliano's statements—that it would not collect
16 additional rent (and its conduct of collecting additional rent contrary to those
17 representations)—were not material because the SNRHA admitted that it would have
18 required a corrective lease under the circumstances. The argument fails as it rests upon
19 an incomplete summary of the deposition testimony cited by the defendants. The
20 deponent, the person most knowledgeable for the SNRHA, testified that the SNRHA would
21 have rejected the lease in the first instance. For a lease that had somehow been
22 approved, she testified that the SNRHA would have stopped the HAP contract, and the
23 owner and tenant would have to submit a new packet. The deponent further denied that a
24 process existed to merely issue a corrective notice. That the deponent testified that the
25 SNRHA would require the submission of a corrected lease is irrelevant. Such a corrected
26 lease would be required for the owner to enter into a new HAP contract based upon the

1 new lease. At issue, however, is whether the SNRHA would have entered into the original
2 lease absent Galliano's representations that it would reduce the rent to \$994, would not
3 seek to collect the difference caused by the reduction, and would not charge or collect rent
4 in addition to the \$994. The undisputed evidence is that the SNRHA would not entered into
5 the HAP contract. Accordingly, the Court finds that not only did Galliano's statements and
6 conduct cause the government to pay money, but those representations were material in
7 causing the government to pay money.

8 The last issue the Court must address is whether Galliano made its statements, and
9 engaged in its conduct, with scienter. That the statements and conduct occurred and were
10 material does not establish that Galliano acted with scienter in making the statements and
11 engaging in the conduct.

12 The defendants argue that Benitez cannot establish that Galliano acted with scienter
13 because Galliano reasonably interpreted the lease as authorizing them to collect the total
14 amount of \$1,191 each month from Benitez, which amount included both rent and "non-
15 rent obligations." The defendants' motion, and their oppositions to Benitez' motion,
16 provides scant support for their argument.

17 The defendants assert such an interpretation would be reasonable because "the
18 subject Lease expressly states that the total amount of monthly payments, including
19 non-rent obligation shall be \$1191." In their Undisputed Fact #16a, they clarify that:
20 "[s]pecifically, under Section 3 of the Lease, total monthly payment including non-rent
21 obligations shall be \$1191." The assertion is contrary to the language of Section 3.

22 First, as relevant to this dispute, Section 3 (captioned "ADDITIONAL MONIES
23 DUE:") provides that the "RENTAL PAYMENT WILL BE \$1,191 INCLUDING SEWER &
24 TRASH. . ." Accordingly, and fatal to the defendants' argument, Section 3 does not
25 authorize the collection of a *total* payment, but rather the collection of a *rental* payment.
26

1 Second, contrary to defendants' characterization, Section 3 neither uses,
2 references, nor defines the phrase: "non-rent obligations." In apparent support for their
3 argument that Section 3 governs "non-rent obligations," the defendants characterize
4 Section 16 of the lease as "a list of non-rent obligations. . ." As with their characterization
5 of Section 3, this characterization of Section 16 is also contrary to the language of the
6 lease. Section 16 of the lease governs "UTILITIES." The section allocates the
7 responsibility for paying for the utilities, and identifies and allocates the party having
8 responsibility to connect the utilities in their respective name.

9 Section 16 does reflect an agreement that Benitez would be responsible for paying
10 for all utilities. The section lacks any language, however, that Benitez' obligation to pay for
11 these utilities constituted a "non-rent" obligation that she owed to Galliano. Section 16.a of
12 the lease allocates to Benitez the responsibility for obtaining and connecting (as
13 appropriate) electricity, gas, water, phone and cable in her name. As these utilities would
14 be in Benitez' name, she would not make these payments to Galliano.

15 Section 16.b of the lease allocates to Galliano the obligation of maintaining the
16 connection for sewer and trash in its name, and further provides that Galliano would "bill
17 [Benitez] for connection fees and use accordingly." Section 16.b does not, however,
18 establish that Benitez' payment of sewer and trash fees to Galliano would be a "non-rent"
19 obligation. Rather, as recited in Section 3 of the lease, the parties agreed that the sewer
20 and trash fees would be included within the amount paid as rent.

21 Given that the language of Section 3 is contrary to an interpretation that the total
22 monthly payment (including non-rent obligations) would be \$1,191, the defendants'
23 argument actually appears to rest on an unstated premise: that the phrase in Section 3 that
24 "rental payment will be \$1,191 including sewer and trash" conflicts with other terms of the
25 lease as well as with the terms of the HAP contract. As such, the phrase can be
26 reasonably interpreted, in the context of those controlling provisions, to ignore the word

1 "rental," leaving the phrase "payment will be \$1,191 including sewer and trash." The Court
2 disagrees.

3 Without dispute, the phrase "rental payment of \$1,191" in Section 3 directly conflicts
4 with Section 6 of the lease, which is captioned "RENT," and which appears on the same
5 page of the lease as Section 3. Section 6 expressly provides that "TENANT shall pay rent
6 at the monthly rate of \$994.00. . ." Section 3 also conflicts with Section 5 of the lease,
7 which is captioned "TERM." Section 5 states that "[t]he term hereof shall commence on
8 January 17, 2013, and continue until January 31, 2014, for a total rent of 12,409.00. . ."
9 When considered in light of the initial term of the lease, the amount of the total rent
10 identified in Section 5 is consistent with a monthly rent of \$994, as identified in Section 6.
11 Further, on January 3, Galliano signed a "Reduction of Rent Acknowledgment" indicating
12 an agreement to reduce the rent to \$994 so that Benitez could qualify for payment
13 assistance for the housing based upon the 40% rule.

14 In addition, Section 4.a of the Tenancy Addendum (Part C of the HAP contract)
15 provides that "[t]he initial rent to owner may not exceed the amount approved by the PHA in
16 accordance with HUD requirements." As with Sections 5 and 6 of the lease, Section 6 of
17 Part A of the HAP contract established that the amount approved by the SNRHA as the
18 initial rent was \$994. Pursuant to Section 14 of the Tenancy Addendum (Part C of the HAP
19 contract), "[i]n case of any conflict between the provisions of the tenancy addendum as
20 required by HUD, and any other provisions of the lease or any other agreement between
21 the owner and the tenant, the requirements of the HUD-required tenancy addendum shall
22 control."

23 Given that Section 3's recitation that the rental payment is \$1,191 conflicts with the
24 governing terms of the lease and Tenancy Addendum which establish that the rent is \$994,
25 the only possible interpretation of the lease is that the rent is \$994. Any other interpretation
26 would be unreasonable, frivolous and in bad faith. Further, the defendants do not argue

1 lease can be reasonably interpreted as allowing them to collect rent in the amount of
 2 \$1,191.

3 Rather, the defendants' argument rests upon a different conflict that they assert
 4 exists between the language of Section 3 and the HAP contract: the HAP contract excludes
 5 sewer and trash from rent but Section 3 includes sewer and trash⁴ as part of the rent.
 6 They refer to Section 8 of Part A of the HAP contract, arguing that it establishes that
 7 Benitez was responsible for paying the fees for sewer and trash. Pursuant to Section 5.e
 8 of the Tenancy Addendum, these fees would not be included in the rent to owner.
 9 According to the defendants' argument, as the amount identified in Section 3 was \$1,191,
 10 and as this amount includes "sewer and trash," and as the rent could not exceed \$994, it is
 11 the word "rental" that conflicts with the other terms of the lease, and that can reasonably be
 12 disregarded in interpreting the lease. Accordingly, and stripped of the defendants'
 13 obfuscating "non-rent obligations" language, the defendants argument is that they could
 14 reasonably interpret Section 3 as stating: Galliano is authorized to collect (a) rent in the
 15 amount of \$994 and (b) sewer and trash fees in the amount of \$197. Such an
 16 interpretation is unreasonable, and borders on the frivolous, because Benitez did not agree
 17 to pay \$197 for sewer and trash fees.

18 The defendants argue that "[n]owhere under the HAP Contract or related regulation
 19 is it mentioned that GRI and Relator cannot agree upon an amount for non-rent obligations
 20 subject to disclosure and approval by SNRHA." The argument rests upon the faulty
 21 premise that the HAP contract and the related regulations permit agreements for "non-rent
 22 obligations." As noted above, the concept of "non-rent obligations" does not appear

23
 24 ⁴ While the defendants characterize the \$1,191 as including "non-rent"
 25 obligations, they never specifically identify the "non-rent" obligations they assert were owed
 26 by Benitez. Nothing in the lease identifies non-rent obligations. Rather, the lease and the
 HAP contract reference utilities and permit the relevant parties to allocate the responsibility
 for paying for those utilities. Pursuant to the lease and the HAP contract, Benitez was
 responsible for paying for sewer and trash.

1 anywhere within the HAP contract nor the lease. Rather, the HAP contract (and related
2 regulations) permit the owner to receive rent. The HAP contract (and related regulations)
3 permit the owner and the tenant to allocate responsibility for paying for the utilities
4 necessary to habitation of the housing unit.

5 Further, the defendants do not direct the Court's attention to any evidence
6 supporting even an inference that Galliano and Benitez agreed that sewer and trash fees
7 were \$197. Rather, an agreement that Benitez would pay \$197 for sewer and trash
8 conflicts with other provisions of the lease and the HAP contract. Section 8 recites that
9 Benitez was responsible for paying the utility fees for sewer and trash; it does recite that
10 the amount of those fees was \$197. The only evidence before this court of the actual
11 amount of sewer and trash fees establishes that they did not exceed \$35. In addition, in
12 Section 2 of the lease, the parties recited that the amount owed for sewer and trash was
13 \$35. As such, the only evidence before the Court is that Galliano and Benitez agreed that
14 the amount of sewer and trash fees would be \$35. Accordingly, interpreting Section 3 as
15 authorizing the collection of \$197 for sewer and trash fees is unreasonable.

16 Interestingly, Golden River asserts, in its opposition to Benitez' motion and citing
17 Tam's Declaration, that:

18 As SNRHA is often not obligated to pay the entire rent and bears no
19 responsibility for Non-Rent Obligations, Tenant agreed to sign Addendum #2,
20 acknowledging that she would pay the balance of \$1191 for the contract unit
21 and for Non-Rent Obligations.

22 Addendum #2 provided:

23 The rent is \$1191 per month, which includes sewer and trash. Tenant,
24 Norma Ariasbenitez has Section 8. Tenant is responsible to pay the
25 remaining portion of what Section 8 does not cover.

26 To the extent Golden River is arguing that Galliano had Benitez agree to pay the balance
27 between \$1,191 and the rent paid by SNRHA and Benitez' non-rent obligations in
28 anticipation that the SNRHA might reduce the rent, the argument amounts to nothing less

1 than an admission of scienter. Galliano had Benitez agree to pay the difference resulting
2 from a reduction of rent that Galliano anticipated the SNRHA would require. Galliano could
3 only have enforced this agreement knowing (or deliberating ignoring or recklessly
4 disregarding) that it had represented that it would not collect the difference resulting from
5 the reduction in rent and that it would not collect additional rent from Benitez.

6 Further, even if Golden River is arguing that, in anticipation that the SNRHA might
7 reduce the rent, Galliano had Benitez agree that the sewer and trash fee was equal to the
8 *balance* between \$1,191 and the rent approved by the SNRHA, the argument is, again, an
9 admission of scienter. Requiring a tenant to agree that the amount owed for sewer and
10 trash would be determined without any basis to the actual fees for those utilities, but rather
11 would be based solely on difference between \$1,191 and the approved rent, is a poorly
12 disguised agreement that Benitez would pay additional rent. Galliano could not reasonably
13 interpret its own agreement with Benitez as an agreement to pay sewer and trash fees.
14 Galliano could only have enforced this agreement knowing (or deliberating ignoring or
15 recklessly disregarding) that it had represented that it would not attempt to collect
16 additional rent from Benitez.

17 Finally, while the defendants have argued they could have reasonably interpreted
18 the lease and HAP contract as permitting them to collect \$197 from Benitez for sewer and
19 trash, they do not direct the court's attention to any evidence that Galliano actually
20 interpreted the lease and HAP contract in this manner. Rather, the evidence before the
21 Court is that Galliano interpreted the contract to authorize them to collect \$1,191 as rent,
22 and that this amount included sewer and trash.

23 Pursuant to the express terms of the lease, the prorated rent from January 17, 2013,
24 through January 31, 2013, was \$481. The defendants recorded, in their ledger,⁵ that they
25

26 ⁵ The defendants have argued that the ledger is inadmissible because it is not
authenticated. The Court recognizes that Benitez did not authenticate the document until

1 charged the SNRHA \$180 for this period, which the SNRHA paid. Such payment
 2 establishes that the rent owed by Benitez for this period was \$301. However, the
 3 defendants recorded that they charged Benitez rent in the amount of \$416, which
 4 establishes they charged her additional rent in the amount of \$115. As recorded in the
 5 ledger, the defendants collected rent in the amount of \$420 from Benitez, or \$119 in
 6 excess of her portion of the rent for January 2013.

7 The defendants recorded that, for February 2013, they charged the SNRHA \$371 for
 8 its Section 8 portion of the rent. The defendants recorded that the SNRHA paid \$371, and
 9 they allocated this payment to “rent + sewer/trash.” Golden River has argued that Galliano
 10 caused Benitez to sign Addendum #2, in part, because SNRHA would not be responsible
 11 for “non-rent obligations.” Fees for a utility are part of the rent to owner only if the utility is
 12 provided and paid for by the owner.⁶ Section 3 of the lease provided that the rental
 13 payment “included sewer and trash.” Accordingly, this portion of the ledger shows that
 14 Galliano interpreted the lease and HAP contract, and treated the payment from the
 15 SNRHA, to include the fees for sewer and trash within the rent to owner. As the approved
 16 amount of rent was \$994, the balance of the rent owed by Benitez was \$623. However,
 17
 18

19 her reply to her motion. Counsel for Benitez indicates he received the ledger from Golden
 20 River on August 20, 2015. That date suggests counsel received the document in
 connection with Galliano’s efforts to evict Benitez for failure to pay her rent.

21 In seeking summary judgment on Benitez’ declaratory judgment claim seeking a
 determination that she does not owe late fees, the defendants rely on Tam’s Declaration,
 22 which Golden River submitted in opposition to Benitez’ motion. The defendants argue that
 in her declaration, Tam declares that Golden River “did account for late fees incurred each
 month.” The Court cannot discern any such statement in the declaration. Rather, Tam
 23 only asserts that “[d]espite being advised of late fees by GRI staff, Tenant allowed
 substantial late fees to accrue on her account by making late payments.” Nevertheless,
 24 the Court would note that the ledger does support the defendants’ argument that Golden
 River accounted for the late fees as they accrued each month.

25 ⁶ Section 5.e of the Tenancy Addendum provides, “[r]ent to owner includes all
 26 housing services, maintenance, utilities and appliances to be provided and paid by the
 owner in accordance with the lease.”

1 the defendants recorded that they charged, and Benitez paid, rent in the amount of \$820,
2 or additional rent in the amount of \$197.

3 The defendants' record for the month of March is similar, charging rent to both the
4 SNRHA and Benitez. As in February, the defendants allocated the SNRHA's payment to
5 rent and sewer and trash. As in February, the defendants charged Benitez rent in the
6 amount of \$494, exceeding her portion of the rent by \$197. The defendants recorded a
7 payment from Benitez in the amount of \$409, an amount that was \$112 in excess of her
8 portion of the rent.

9 Beginning in April 2013, the defendants no longer allocated SNRHA's payment to
10 "rent + sewer/trash." Rather, the defendants recorded SNRHA's payment as the "Sec 8
11 portion)." The defendants recorded that they charged Benitez rent in the amount of \$494,
12 exceeding her portion of the rent by \$197. The defendants recorded receiving a payment
13 from Benitez in the amount of \$453, an amount that was \$156 in excess of her portion of
14 the rent. The defendants' ledger contains similar records for May, June, and July. Each
15 month, the ledger records that they charged Benitez rent that exceeded her portion of the
16 rent by \$197. Benitez did not make any payment in July. In August, the defendants
17 allocated Benitez' payment as paying the balance between the amount they charged and
18 the amount Benitez paid for rent for March through June, with the remainder allocated to
19 her rent obligation for July.

20 The remainder of the defendants' ledger follows the same pattern. Each month,
21 they charged Benitez an amount for rent that exceeded her portion of the rent by \$197.
22 Throughout the tenancy, they allocated all payments from Benitez to rent. The defendants
23 never recorded a charge against Benitez for either sewer or trash. At no time did the
24 defendants allocate any payment received from Benitez as paying for either sewer or
25
26

1 trash.⁷ Entirely absent from the defendants' ledger is any use of the term "non-rent"
2 obligation.

3 Galliano could not reasonably construe the lease and HAP contract as authorizing
4 the collection of \$994 for rent and \$197 for sewer and trash. Further, Galliano did not
5 interpret the lease in this manner. Rather, despite the terms of the lease and the HAP
6 contract, Galliano charged and collected (or attempted to collect) rent in the amount of
7 \$1,191 each month, knowing (or recklessly disregarding or deliberately ignoring) that this
8 amount exceeded the approved monthly rent of \$994. Accordingly, even construing the
9 evidence in favor of the defendants, the Court finds that Galliano acted with scienter when
10 it agreed and represented to the SNRHA that it would reduce the rent, that it would not
11 collect the difference resulting from this reduction, and that it would not collect additional
12 rent from Benitez, but then charged and collected additional rent from her.

13 Damages

14 Any person who violates the FCA is liable to the United States for not less than
15 \$5,500 and not more than \$11,000, plus three times the damages suffered by the United
16 States as a result of the violation. 31 U.S.C. §3729(a)(1) and (3); 28 C.F.R. 85.3.

17 The appropriate measure of the damages suffered by the United States is the sum
18 of all payments made by the United States under the HAP contract. Pursuant to the HAP
19 contract, the SNRHA paid Galliano \$25,185 during the period January 2013 through
20 October 2015. Multiplying this amount by three times results in damages of \$75,555.

21 The parties do not dispute that each violation of the FCA gives rise to separate
22 liability and thus a separate civil penalty. *United States ex rel Hendow v. Univ. of Phoenix*,
23 461 F.3d 1166 (9th Cir. 2006). Benitez argues that the defendants violated the FCA each
24

25 _____
26 ⁷ Further, to the extent the ledger can be construed as identifying the amount
of fees for sewer and trash, it suggests that those fees were \$35, consistent with Section 2
of the lease.

1 month they charged her for additional rent (32 months) and in each of the two additional
2 months they did not charge her additional rent but still received an assistance payment
3 from the SNRHA. Citing *United States ex rel. Oliver v. The Parsons Corp.*, 498 F.Supp.2nd
4 1260, 1292 (C.D. Cal. 2006), the defendants argue the only violation of the FCA occurred
5 when it entered into the HAP contract with the SNRHA. The language upon which the
6 defendants rely relies is, as expressed by that court, dicta. The court had denied the
7 defendants' motion to limit the damages to only the two initial disclosures that it would use
8 a specific accounting practice. The court nevertheless indicated its determination that
9 awarding damages for each (of what the court described as) 4,056 indirect expense rate
10 claims would result in "astronomical damages" that could not "logically be what Congress
11 intended."

12 The present matter does not concern indirect expense rate claims under an
13 accounting standard other than as represented in disclosure statements. Rather, the
14 present matter involves two separate statements by the defendants regarding the rent to
15 be charged to Benitez. In the Reduction of Rent Acknowledgment, Galliano agreed to
16 reduce the rent to \$994, agreed that no additional rent would be collected from Benitez,
17 agreed to reduce the security deposit to not exceed the monthly amount, and agreed that it
18 could not "collect the difference in the rent change from" Benitez, and agreed that doing so
19 would be a breach of the HAP contract. In the HAP contract, Galliano agreed that the rent
20 was \$994, agreed that other than the rent to owner, it would not receive any payments or
21 other consideration from Benitez for rental of the unit, and agreed that it would not charge
22 or accept any payment from Benitez for rent of the unit in addition to the rent to owner, and
23 agreed that it would immediately return "any excess payment to the tenant." Thus, if the
24 violations are to be measured solely by the false statements, Galliano committed at least
25 two violations when it signed each of these documents.

26

1 In contrast to *Oliver*, each month's charge for and collection of additional rent from
2 Benitez was directly contrary to Galliano's numerous representations that it would reduce
3 the rent, would not collect the difference resulting from the change, and would not charge
4 or receive rent in addition to the approved rent of \$994. Further, the present matter does
5 not involve more than 4,000 indirect violations, but at most 34 monthly actions directly
6 contrary to Galliano's representations. Even the maximum penalty sought by Benitez,
7 \$374,000, does not constitute an "astronomical penalty" that Congress could not logically
8 have intended. Rather, it readily falls within an expected penalty for repeated conduct
9 extending over two and a half years. Accordingly, the Court finds that each month in which
10 Galliano both received an assistance payment and charged Benitez additional rent
11 constitutes a separate violation of the FCA.

12 The Court finds that a closer question exists whether violations occurred in the last
13 two months of the tenancy. During those months, Galliano did not charge or collect
14 additional rent from Benitez, but did receive assistance payments from the SNRHA. The
15 Court finds that Galliano's acceptance of assistance payments in months in which it did not
16 attempt to collect excess rent does not constitute a separate violation of the FCA.
17 Accordingly, the Court finds that Galliano committed 32 violations of the FCA.

18 As to the appropriate amount of the penalty for each violation, the Court finds that,
19 from the outset of the process, Galliano not only intended to collect \$1,191 each month
20 from Benitez, but was aware that she was a Section 8 tenant, and that the amount of rent
21 was subject to the approval of the SNRHA. Galliano engaged in a course of conduct to
22 ensure that it could collect \$1,191 for the rental of the unit, regardless of the amount of rent
23 approved by the SNRHA. Further, Galliano placed on Benitez the entire burden of
24 offsetting any reduction in rent from the amount of \$1,191 on Benitez. Galliano was
25 notified and agreed on two separate occasions in two separate documents to reduce the
26 rent, to not collect the difference caused by the reduction, and to not collect rent in addition

1 to the authorized amount. From the outset of the tenancy, Galliano ignored the terms of
2 the lease and the HAP contract, and instead charged Benitez rent an amount that would
3 ensure it collected \$1,191 for the rental of the unit. The only mitigation in favor of Galliano
4 is that (assuming the HAP contract excluded sewer and trash from the amount of rent) its
5 efforts were directed at obtaining the amount of \$162. Such mitigation, however, must be
6 considered in the context that Galliano sought this payment from a person whom it knew
7 required assistance in the payment of rent. While the Court believes that a penalty of
8 \$11,000 for each violation could be supported, the appropriate penalty under the
9 circumstances of this case is \$5,500 for each violation. Such amount is sufficient and
10 appropriate in light of the nature of each of the 32 violations of the FCA. Further, as the
11 conduct of Galliano resulted from the actions of Golden River on behalf of Galliano, both
12 Galliano and Golden River are liable. Accordingly, the defendants must pay a penalty of
13 \$176,000.

14 Benitez is further entitled to her costs for bringing this civil action to recover a
15 penalty and damages under the FCA.

16 Late Fees

17 In her Amended Complaint, Benitez seeks a declaration that the defendants
18 erroneously charged late fees. Golden River (but not Galliano) has filed a counterclaim
19 alleging Benitez agreed to pay Golden River monthly payments in a timely manner, but
20 breached that agreement by failing to pay in a timely manner and failing to pay the
21 associated late fees, eviction fees, and advances. Golden River further asserts this
22 conduct breached the implied covenant of good faith and fair dealing, and unjustly enriched
23 Benitez due to her retaining and using the property without making timely payments.

24 The defendants argue that summary judgment should be granted in their favor on
25 Benitez' late fees claim because they did not intentionally relinquish their right to collect late
26 fees. They assert Benitez was "notified" that they were imposing late fees because she

1 signed the lease, which identifies the date on which rent was due, recites that late fees
2 would be imposed, and establishes the amount of the late fees. The defendants argue
3 that, in her declaration, Tam declares that Golden River “did account for late fees incurred
4 each month.” The Court cannot discern any such statement in the declaration. Rather,
5 Tam only asserts that “[d]espite being advised of late fees by GRI staff, Tenant allowed
6 substantial late fees to accrue on her account by making late payments.” Nevertheless,
7 the Court would note that the ledger does support the defendants’ argument that Golden
8 River accounted for the late fees as they accrued each month.

9 The ledger also indicates, however, that Golden River did not allocate any payment
10 from Benitez to the recorded late fee. Rather, the notations within the ledger allocate her
11 payments to her rent for each month. Whether Galliano or Golden River actually notified
12 Benitez of the late fees remains a question of fact. Further, in light of the Court’s
13 determination that Galliano sought and collected additional rent from Benitez each month,
14 a fact remains whether Benitez payments were late or, if so, the extent to which she paid
15 those late fees. The Court will deny the defendants’ motion to dismiss Benitez’ declaratory
16 judgment claims.

17 Conversely, Benitez’ motion to dismiss the breach of contract claim fails. In the
18 context of this case, and the allegations of her own Amended Complaint, the allegations of
19 the counterclaim are sufficient to permit Benitez to defend herself against the claim.

20 The Court agrees with Benitez that Golden River has not alleged claims for breach
21 of the implied covenant of good faith and fair dealing or for unjust enrichment. Golden
22 River’s claim for breach of the implied covenant is merely duplicative of its breach of
23 contract claim: Golden River does not allege that Benitez complied with literal terms of the
24 contract but acted in bad faith; rather, it alleges only that she breached the terms of the
25 contract.

26

1 Similarly, Golden River cannot maintain its unjust enrichment claim. To the extent
2 Golden River is alleging Benitez retained the late fees and other fees owed under the
3 contract, the claim is merely duplicative of its claim for breach of contract. To the extent
4 Golden River brings this claim on the basis of some other benefit retained by Benitez, it
5 has not alleged any facts indicating what benefit Golden River conferred and Benitez
6 retained. THEREFOR, for good cause shown,

7 THE COURT ORDERS that Defendants' Motions to Dismiss (ECF Nos. 18, 19) are
8 DENIED as moot.

9 THE COURT FURTHER ORDERS Plaintiff's Motion to Dismiss Counterclaim (ECF
10 No. 43) is DENIED as to Golden River Investments, LLC First Cause of Action, and si
11 GRANTED as to its Second and Third Causes of Action.

12 THE COURT FURTHER ORDERS that Defendant Galliano, LLC's Motion to Strike
13 (ECF No. 58) is DENIED.

14 THE COURT FURTHER ORDERS that Defendant Golden River Investments, LLC's
15 Motion for Summary Judgment (ECF No. 62), which motion Defendant Galliano, LLC
16 joined (ECF No. 63) is DENIED.

17 THE COURT FURTHER ORDERS that Plaintiff Norma Arias Benitez' Motion for
18 Partial Summary Judgment (ECF No. 42) is GRANTED.

19 THE COURT FURTHER ORDERS that Plaintiff Norma Arias Benitez shall, not later
20 than 14 days after entry of this Order, submit a proposed Partial Summary Judgment
21 consistent with this Order.

22 DATED this 36 day of January, 2018


Lloyd D. George
United States District Judge